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**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In the Matter of:)
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Grand Pier Center, LLC)
)
)

CERCLA 106(b) Petition No. 04-01
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)

GRAND PIER CENTER, LLC's SUPPLEMENTAL REPLY BRIEF

In accord with the Environmental Appeals Board Order of June 3, 2005, Petitioner provides this Supplemental Reply Brief in response to USEPA's Supplemental Brief submitted on May 31, 2005. This matter is set for oral argument on June 16, 2005.

There are certain irrefutable facts in this case that USEPA fears and appears unwilling to acknowledge: 1) Petitioner never held fee title to any portion of the sidewalk right-of-way; 2) Petitioner never held a lease relating to any portion of the sidewalk right-of-way; 3) at all times the City of Chicago was the legal title holder of the sidewalk right-of-way; 4) Petitioner was granted a permit by the City of Chicago to perform certain work within the sidewalk right-of-way; and 5) the City of Chicago never ceded any ownership of the sidewalk right-of-way to Petitioner or any third party. These facts are the backbone of Petitioner's demand for reimbursement of clean up costs expended within the sidewalk right-of-way and are fatal to USEPA's objection to that demand.

USEPA alleges in its May 31, 2005 supplemental brief that by obtaining "permits to block access to the ... sidewalk right-of-way, to excavate and fill and install permanent encroachments within the sidewalk right-of-way," Petitioner somehow became owner of the sidewalk right-of-way. USEPA Supp. Br. at 1. Not surprisingly, USEPA fails to

produce any precedent before any court anywhere indicating that by issuing a permit to perform work in the right-of-way, the City of Chicago ceded ownership of the right-of-way temporarily or permanently to the permit holder, Grand Pier.

Instead, USEPA seeks to obfuscate the facts of this case by attempting to mysteriously transform Grand Pier from a permit holder to a lease holder. USEPA Supp. Br. at 2-4. But, there is no lease at issue in this case, and Petitioner is not a lease holder of the sidewalk right-of-way. Consequently, the cases USEPA has cited, including *U.S. v. South Carolina Recycling & Disposal, Inc.*, 653 F.Supp. 984 (D. S.C. 1984); *Pape v. Great Lakes Chem. Co.*, 1993 U.S. Dist. LEXIS 14674, 1993 WL 424249, No. 93 C 1585 (N.D. Ill. Oct. 19, 1993), are incurably inapposite. Furthermore, these cases do not provide any basis for concluding that the legal status of a permit holder is analogous to the legal status of lease holder. USEPA's supplemental arguments in its third brief to the Board (when the rules allow one brief) do not save the Agency's situation.

Finally, *In re Town of Marblehead*, 10 E.A.D. 570 (EAB 2002), is not favorable to USEPA's objection to Petitioner's demand for reimbursement for clean up costs expended within the sidewalk right-of-way area. In that suit, the town of Marblehead held three deeds for three separate parcels within a railroad right-of-way adjacent to a lead mill. The Board held that the town was unable to distinguish harm to that portion of the right-of-way owned by the town and that portion owned by third parties. It was uncontested that the town was within the chain of title for portions of the right-of-way that were remediated. These facts are fundamentally distinguishable from the facts before this Board. Contrary to the *Marblehead* case, Petitioner here does not have any ownership of any portion of the right-of-way. In *Marblehead*, the town conceded being

in the chain of title for portion of the remediated right-of-way; whereas, here Petitioner does not make any similar concession as to the sidewalk right-of-way. USEPA's reliance on the inapplicable factual and legal scenario present in *Marblehead* only shows the weak nature of USEPA's defensive position in this case.

From the beginning of this dispute, USEPA has maintained that Petitioner was liable as owner of the RV3 Site. However, Petitioner has never been owner of any portion of the adjacent sidewalk right-of-way. Consequently, as presented in the papers submitted to this Board in support of the Petition for Reimbursement, Petitioner is not liable according to CERCLA for the clean up costs completed within the sidewalk right-of-way and are now entitled to reimbursement of those costs.

For the foregoing reasons, Grand Pier Center, LLC requests this Environmental Appeals Board to grant the petition for reimbursement, and find that Petitioner is entitled to reimbursement of all monies spent to remediate the soil in the sidewalk right-of-way adjacent to Parcel Number 17 10 212 019.

Respectfully submitted this 8th day of June 2005

GRAND PIER CENTER LLC

By: 
Attorney for Petitioner

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CERTIFICATE OF SERVICE

The undersigned, a non-attorney, on oath states she caused to be served the foregoing **GRAND PIER CENTER, LLC's MOTION FOR LEAVE TO FILE REPLY BRIEF** by facsimile and U.S. mail to:

Mary L. Fulgham
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Via facsimile and regular first class U.S. postal service mail at 55 East Monroe Street, Chicago, Illinois 60603 before 5:00 p.m., on the 8th day of June, 2005.

Bridget E. Drecki

[x] Under penalties as provided by law pursuant to Ill. Rev. Stat. Chap 110 §1-109, I certify that the statements set forth herein are true and correct.

Subscribed to and sworn before me
this 8th day of June 2005.

Cynthia Lea Tempel
NOTARY PUBLIC



My Commission Expires: *Oct. 20, 2005*

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

May 31, 2005

C-14J

VIA FACSIMILE AND POUCH MAIL


Eurika Durr
U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, DC 20005

RE: Petition Number: CERCLA 106(b) 04-01
 Grand Pier Center, LLC, Chicago IL

Dear Ms. Durr:

With this letter, I am enclosing an original and five copies of Respondent's Motion For Leave to File Instant Supplemental Brief. The Instant Supplemental Brief is attached to the motion. Thank you for your assistance.

Sincerely yours,


Mary L. Fulghum
Associate Regional Counsel

Enclosures

cc: Frederick Mueller w/encl.

bcc (w/encl):

Cathleen Martwick
Erik Swenson
Maria Cintron-Silva
Earl Salo
Lee Tyner
Annette Lang